121 U.S. 637 (1887) (train passenger) and *New Orleans & N.E.R. Co. v. Jopes*, 142 U.S. 18 (1891) (vessel passenger). Citing *Stewart v. The Brooklyn and Cross-Town Railroad Co.*, 90 N.Y. 588, 591 (N.Y. 1882) as support for its position, *Brockett* states the standard of care in Passenger Assault Cases as follows:

> [A] common carrier is bound, as far as practicable, to protect its passengers, while being conveyed, from violence committed by strangers and co-passengers, and undertakes absolutely to protect [passengers] against the misconduct of its own servants engaged **in executing the contract.**

121 U.S. at 645-46 (emphasis added).[4]

In quoting *Brockett*, *Jopes* reiterates that "a common carrier undertakes absolutely to protect its passengers against the misconduct or negligence of its own servants, employed **in executing the contract of transportation.**" 142 U.S. at 25 (emphasis added). *Jopes* further states the following:

> But owing to the peculiar circumstances which surround the carrying of passengers, as stated, a more stringent rule of liability has been cast upon the employer; and he has been held liable although the assault was wanton and willful, and outside the scope of the employment. **Noticeable instances of this kind are the cases of *Craker v. Railroad Co.*, 36 Wis. 657**, in

[4] The New York Court of Appeals overruled and completely repudiated *Stewart* in *Adams v. New York Transit Authority*, 88 N.Y.2d 116, 117-23 (N.Y. 1996) (*Stewart*'s implied contractual strict liability rule is "fundamentally flawed" and "no longer viable").

> which, when a conductor had forcibly kissed a lady passenger, the company was held responsible for the unlawful assault; **and *Goddard v. Railroad Co.*, 57 Me. 202**, in which, when a brakeman had committed a gross and offensive assault upon an invalid passenger the company was held liable in damages.

142 U.S. at 27 (emphasis added). Although *Brockett* and *Jopes* represent support for a rule of strict liability against common carrier employers in Passenger Assault Cases, an analysis of *Stewart*, *Craker v. Chicago & Northwestern Railway Co.*, 36 Wis. 657 (Wis. 1875) and *Goddard v. Grand Trunk Railway of Canada*, 57 Me. 202 (Me. 1869) is necessary to identify their conceptual underpinnings.

Stewart is a New York State railroad case wherein the passenger was attacked and beaten by the conductor. In holding the carrier strictly liable for the intentional tort of its employee, *Stewart* rationalizes its finding of strict liability based on the carrier's contractual duty to absolutely protect its passengers from assaults by its employees. 90 N.Y. at 590-91. Similarly, *Craker* explains that a carrier is strictly liable for the misconduct of its agents, regardless of whether the agent acts outside the scope of the agent's employment, based on the stipulation for safe passage implied in the contract of carriage. 36 Wis. at 671-72. And again, *Goddard* finds carriers strictly liable in Passenger Assault Cases because "the carrier's implied promise [of safety] is broken." 57 Me. at 217-18. Thus, this Court's 19th Century opinions spawned a rule that a common carrier is strictly liable for assaults against passengers by its employees based on the duty of safe passage implied in the contract of carriage ("Implied Contractual Strict Liability Rule").

The first indication that this Court no longer supports the Implied Contractual Strict Liability Rule but recognizes "negligence" in passenger cases appears in *The Admiral Peoples*, 295 U.S. 649 (1935).[5] Although the Implied Contractual Strict Liability Rule is not addressed directly, *The Admiral Peoples* discusses a "negligence" standard and makes no reference to strict liability or any implied contractual responsibility. 295 U.S. at 652. Without providing any guidance regarding the fate of Implied Contractual Strict Liability Rule, no further "passenger cases" were decided by this Court until *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1958).[6]

In *Kermarec*, this Court articulated a rule of law that is inconsistent with the Implied Contractual Strict Liability Rule. As *Kermarec* explains in one simple sentence:

> It is a settled principal of maritime law that a shipowner owes the duty to exercise reasonable care towards those lawfully aboard the vessel who are not members of the crew.

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[5] Prior to *Brockett* and *Jopes*, but not in a passenger case, this Court issued an opinion that referred to traditional "negligence" as the proper standard of care in a claim by a shipboard visitor against a vessel owner. *Leathers v. Blessing*, 105 U.S. 626 (1881).

[6] Excluding Passenger Assault Cases, *Kermarec* is recognized in every circuit issuing an opinion as setting the standard in "passenger cases." *In re Catalina Cruises, Inc.*, 137 F.3d 1422 (9th Cir. 1998); *Beard v. Norwegian Caribbean Lines*, 900 F.2d 71, 73-74 (6th Cir. 1990); *Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318 (11th Cir. 1989); *Muratore v. M/S SCOTIA PRINCE*, 845 F.2d 347 (1st Cir. 1988); *Smith v. Southern Gulf Marine Company No. 2*, 791 F.2d 416 (5th Cir. 1986); *Rainey v. Paquet Cruises, Inc.*, 709 F.2d 169 (2d Cir. 1983); *Urian v. Milstead*, 473 F.2d 948 (8th Cir. 1973).

358 U.S. at 630 (emphasis added). In support of the *Kermarec* reasonable care standard ("Reasonable Care Rule"), this Court cites *Leathers v. Blessing*, 105 U.S. 626 (the visitor negligence case from the 1800's), *The Max Morris v. Curry*, 137 U.S. 1 (1890) (a longshore negligence case) and *The Admiral Peoples*, 295 U.S. 649 (the passenger "negligence" case from 1935).

Unfortunately, *Kermarec* failed to address the status of the Implied Contractual Strict Liability Rule. This Court's failure to discuss the status of the Implied Contractual Strict Liability Rule in *Kermarec* created the current conflict and confusion regarding whether the Implied Contractual Strict Liability Rule or the Reasonable Care Rule applies in Passenger Assault Cases.

II.

Importance, Uniformity and Fairness

This Court is presented with an opportunity to clarify the outdated, conflicting, and confusing legal concepts and precedent that currently confound the cruise line industry and its customers. *See Brockett*, 121 U.S. at 637; *Jopes*, 142 U.S. at 18; *Kermarec*, 358 U.S. at 625. The present uncertainty with respect to the standard of care in Passenger Assault Cases is contrary to the general maritime law's goal of uniformity. *See The Lottowanna*, 88 U.S. 558, 575 (1874); *American Dredging Co. v. Miller*, 510 U.S. 443, 450-51 (1994). As such, every court should apply a uniform standard of care in Passenger Assault Cases, no matter where the court is located. *See The Lottowanna*, 88 U.S. at 575; *American Dredging Co.*, 510 U.S. at 450-51. Uniformity is particularly important to cruise lines because their vessels sail from numerous different domestic and foreign

ports, often changing itineraries depending on the different sailing seasons.

The imposition of a strict liability standard in Passenger Assault Cases (as opposed to a standard of reasonable care under the circumstances) contravenes the realities of the present cruise industry. Application of the Implied Contractual Strict Liability Rule in Passenger Assault Cases based on its outdated theoretical underpinnings is unjust in light of the modernization and regulation of the cruise industry. In addition, forcing cruise lines to contend with a regime of strict liability increases the cruise lines' costs of operation, increases ticket prices, forces consumers to pursue other vacation options, and depresses the entire industry.

Fairness dictates that cruise lines should not become insurers in Passenger Assault Cases based on concepts that emerged in the 1800's for stagecoaches, railroads, riverboats, and ocean steamers. *See Stewart*, 90 N.Y. at 593-94, *Craker*, 36 Wis. at 674; *Goddard*, 57 Me. at 212-13. The present reality is that cruise lines and cruise vessels no longer function to transport passengers from a point of embarkation to a final destination. *See Spector v. Norwegian Cruise Line, Ltd.*, 125 S. Ct. 2169 (2005). Most cruises begin and end at the same port of call. As this Court recently noted, "**[Cruise] ships are essentially floating resorts. They provide passengers with staterooms or cabins, food, and entertainment.**" *Spector*, 125 S. Ct. at 2175 (emphasis added).

Cruise vessels are destinations in themselves, with the shipboard time spent between ports of call functioning as the true vacation and entertainment experience. With arcades, art galleries, bars, basketball courts, casinos,

exercise equipment, ice skating rinks, jogging tracks, miniature golf courses, movie theatres, restaurants, rock climbing walls, shopping malls, shoreside excursions, swimming pools, and spas, a cruise vessel is significantly more than a means of transportation. *See Spector*, 125 S. Ct. at 2175. A cruise vessel is an amenity-filled resort style vacation destination, just like a hotel on the beach, a Las Vegas casino, or a trip to an amusement park. However, the law subjects hotels, casinos, and amusement parks only to a reasonable care standard with regard to assaults on guests and visitors.[7] No rational basis remains for applying a different standard of care to landside vacation destinations and "resorts that float."

In 2004, 192 cruise ships operating in the North American cruise industry carried a total of 10.85 million passengers.[8] The industry now plans to add twenty-four new ships and 64,652 new berths to its fleet capacity through 2008.[9] With 8.1 million of these passengers embarking from ports in the United States, cruising has become a form of leisure for a significant number of Americans.[10] In addition, the ICCL members employ approximately 120,000 shipboard employees. However, of these 120,000 shipboard employees, only a limited percentage is actually employed in positions relative to the navigation and transportation functions of the vessel.

The vast majority of shipboard employees attend to non-navigational and non-transportation duties. These

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[7] *See* RESTATEMENT (SECOND) OF TORTS § 344 cmt. b (1965).

[8] Business Research & Economic Advisors (BREA), *supra*.

[9] *See id.* at 99.

[10] *See id.* at 3.

employees ensure that the vacationers experience an enjoyable cruise. For example, the entertainers, bartenders, waiters, room stewards, wait staffers, retail sales associates, blackjack dealers, hair stylists, and fitness instructors, etc. are all on board the cruise vessel to perform the same role as if they were employed at a landside resort.

The rationale in prior precedent supporting the Implied Contractual Strict Liability Rule rests on the alleged isolation and vulnerability of the passengers. *See Stewart,* 90 N.Y. at 593-94; *Craker,* 36 Wis. at 674; *Goddard,* 57 Me. at 212-13. However, this line of reasoning crumbles in view of the modern amenities currently available on cruise ships, including the latest in communications technology. Isolation is non-existent as passengers spend a significant portion of their cruise vacation in common areas and reach a new port of call virtually every day. Cellular telephones, which did not exist in the 1800's, are now ubiquitous and provide another potential option for passengers while cruise ships are in port.

As a practical matter, a cruise vessel should be safer than any other vacation destination because every individual on the vessel is known and accounted for. Like a gated community, crewmember and passenger embarkations and disembarkations are monitored and electronically recorded. With a limited pool of passengers and crew and significant security restrictions regarding who can "come and go" from cruise ships, passengers are afforded even more protection than landside resort vacation-goers. Moreover, all ICCL members and most other cruise lines subject their employees to pre-employment background checks, including rigorous criminal scrutiny. Therefore, the Implied Contractual Strict Liability Rule is obsolete,

outmoded, and contrary to the realities of cruising in 2005 and beyond.[11]

In addition, ICCL member cruise lines have, in fact, adopted a zero tolerance policy for crimes committed on their vessels. This policy for reporting and investigating all alleged shipboard crimes exists to protect all passengers. A unique statutory regime provides the Federal Bureau of Investigation with specific jurisdiction to investigate and prosecute crimes involving U.S. citizens even when occurring on the high seas, in foreign territories, or on foreign-flagged vessels. *See* 18 U.S.C. § 7 (2001). Likewise, 14 U.S.C. § 89 (1949) grants the U.S. Coast Guard the authority to investigate crimes and enforce U.S. laws on the high seas in conjunction with the FBI's authority and jurisdiction. With all of the present protections in place, the notion that vulnerable and isolated passengers will fall prey to cruise line employees thereby warranting a strict liability standard is no longer valid. In view of the true nature of the current cruise line fleet and the pervasive presence of U.S. police authority, 19th Century policy supporting strict liability in Passenger Assault Cases is now moot.

Cruise lines do not compete with airlines, trains or automobiles for the actual transportation of passengers.

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[11] Based on information received by the ICCL from the Federal Bureau of Investigation ("FBI"), the FBI investigates approximately thirty-five allegations of passenger vessel assaults per year. This number is quite low in view of the eight to ten million passengers who annually sail on cruise ships. Based on this low frequency of allegations, which range from alleged verbal confrontations to unwanted physical contact, there exists no justification for imposing the heightened strict liability standard on cruise lines while land-based resorts are subject to a standard of reasonable care.

Instead, cruise lines compete with hotels, resorts, and entertainment venues for vacation, holiday, and leisure enthusiasts. In view of the foregoing business environment, no policy justification exists for imposing the Implied Contractual Strict Liability Rule on cruise lines while their competitors (hotels, casinos, resorts, amusement parks, and entertainment venues) are subject to only the traditional negligence standard, the standard of reasonable care under the circumstances.[12] This case presents the Court with the opportunity to clarify and harmonize this conflicted and confusing area of law by embracing the Reasonable Care Rule set forth in *Kermarec*, 358 U.S. at 625.

III.

Conflict or Confusion at the Supreme Court

Whether *Kermarec* is in direct conflict with *Brockett* and *Jopes* or this Court intended for the two lines of cases to awkwardly coexist is unclear. However, in view of the archaic legal concepts and policies underlying *Brockett* and *Jopes* and in view of the modern tort principles articulated in *Kermarec*, the stronger argument is that the Implied Contractual Strict Liability Rule and the *Kermarec* Reasonable Care Rule conflict.

Kermarec holds as follows:

> [T]he owner of a ship in navigable waters owes to all who are on board for purposes not inimical to his legitimate interests the duty of exercising

[12] *See* RESTATEMENT (SECOND) OF TORTS § 344 cmt. b (1965).

> reasonable care under the circumstances of each case.

358 U.S. at 632 (emphasis added). Conversely, as above, *Brockett* and *Jopes* conclude that a common carrier has an implied contractual duty to absolutely protect its passengers from assaults from crewmembers. *Brockett* explains the Implied Contract Strict Liability Rule as follows:

> The [passenger] was entitled, **in virtue of that contract, [of carriage]** to protection against the musconduct [sic] or negligence of the carrier's servants. **Their misconduct** or negligence while transacting the company's business, and when acting within the general scope of their employment, is of necessity to be imputed to the corporation, **which constituted them agents for the performance of its contract with the passenger.**

121 U.S. at 645 (emphasis added). *Jopes* further explains that "[a common] carrier is liable for every conceivable wrongful act done to a passenger by its [employees] while they are engaged in transporting [the passenger]." 142 U.S. at 112. In "coming to grief" on the facts, *Jopes* ultimately holds that a common carrier **does not "[break] his contract of carriage"** if the assault on the passenger by the carrier's employee was justified by the passenger's conduct. 142 U.S. at 112 (emphasis added).

In the end, either *Brockett* and *Jopes* (and the Implied Contractual Strict Liability Rule) are in direct conflict with *Kermarec* (and the Reasonable Care Rule) or the relationship between the cases remains hopelessly confused. Either

way, intervention by this Court is necessary to resolve the conflict or confusion.[13]

IV.

Conflict Among the Circuit Courts of Appeals

Although whether the Supreme Court cases are in direct conflict or hopelessly confused is debatable, the conflict between the Second Circuit Court of Appeals ("Second Circuit") and both the Ninth and Eleventh Circuit Courts of Appeals ("Ninth and Eleventh Circuits") is stark. *Compagnie Generale Transatlantique v. Rivers*, 211 F. 294 (2d Cir. 1914); *Morton v. De Oliveira*, 984 F.2d 289 (9th Cir. 1993); *Doe v. Celebrity Cruises Inc.*, 394 F.3d 891 (11th Cir. 2004).

In *Compagnie Generale Transatlantique*, a passenger sailing on a vessel from New York to Europe was assaulted by a crewmember. 211 F. at 297-98. In affirming the trial court's jury instruction, *Compagnie Generale Transatlantique* states the following:

> **Therefore [the District Court] was most careful**, even at the risk of giving some sound exceptions to plaintiff, **to impress upon the jury that there could be no recovery unless the proofs showed some specific neglect in exercising that degree of care which reasonable prudence would require of a carrier**

[13] Resolution between the 19th Century Implied Contractual Strict Liability Rule and the *Kermarec* Reasonable Care Rule is particularly appropriate in view of the repudiation of *Stewart* by the New York Court of Appeals in *Adams*, 88 N.Y.2d at 117-23. *Stewart* underpinned *Brockett* and *Brockett* was the key support relied upon in *Jopes*.

> **obligated to be watchful and vigilant to protect its sleeping passengers.**

211 F. at 299 (emphasis added).

In the Second Circuit, the district courts have understandably read *Kermarec* and *Compagnie Generale Transatlantique* to require the application of the Reasonable Care Rule in Passenger Assault Cases. *Jaffes v. Home Lines, Inc.*, 1990 AMC 1430 (S.D.N.Y. 1988) ("some 'specific neglect' on the part of the shipowner must be shown before the shipowner can be held liable, even for an intentional assault"); *York v. Commodore Cruise Line*, 863 F. Supp. 159 (S.D.N.Y. 1994) ("There must be some failure to exercise due care before liability may be imposed in an intentional assault case").

In conflict with the Second Circuit, the Ninth Circuit completely accepts and endorses the Implied Contractual Strict Liability Rule. *Pacific S.S. Co. v. Sutton*, 7 F.2d 579 (9th Cir. 1925). In rejecting even the notion that crewmember assaults on passengers are an action **arising in tort**, *Sutton* states as follows:

> [I]n our view, **by the sale of the ticket there arose a contractual relationship between the company and the passenger**, to which relationship the law by its own force annexed certain implied obligations and duties to be observed and performed by the parties, respectively, toward each other. **The contract of carriage made it the duty of the carrier to carry safely and to protect its passenger from violence and insult committed by its own servants.**
>
> * * *

> **A carrier owes a duty to every passenger to protect him from insult and assault. It is a part of the contract of carriage.**
>
> * * *
>
> **It therefore follows that the court was right in treating the case as in contract, controlled by the general principles stated.**

7 F.2d at 580 (emphasis added). Notwithstanding the interim decision in *Kermarec*, *Morton* unequivocally adopts the Implied Contractual Strict Liability Rule set forth in *Sutton*. *Morton*, 984 F.2d at 290.

In the Eleventh Circuit, *Doe* "agree[s] . . . that the age of the *Brockett* and *Jopes* decisions and the intervening decision in *Kermarec* suggest that the Supreme Court might well reconsider its former rulings were an opportunity to arise." 394 F.3d at 909. Notwithstanding the foregoing admission, the Eleventh Circuit adopts the Implied Contractual Strict Liability Rule. *Doe*, 394 F.3d at 909. In reaching its decision, *Doe* attempts to diminish *Kermarec* by quoting frequently from *Brockett*, *Jopes* and *Sutton*. *Doe* states as follows:

> [Even] if the passenger's injuries 'were directly caused by the improper conduct of the carrier's servants, . . . [the passenger] is not precluded from claiming **the benefit of the contract for safe transportation**.'
>
> * * *
>
> **A common carrier's strict liability** to a passenger for crew member assaults during transit **rests upon its special implied duty of protection and safe transport** that it owes as a

> common carrier through its employees to its passengers . . .
>
> * * *
>
> **[W]hile it is the contract for safe transportation that creates an implied duty** on the part of the common carrier to protect and safely transport its passengers, the 'breach of the carrier's duty is a maritime tort.'

394 F.3d 904-05, 907 (emphasis added).

At the end of the day, the liability standard applied in a Passenger Assault Case will depend entirely on the Circuit where the suit is filed. In the Second Circuit, the standard is reasonable care under the circumstances. *Compagnie Generale Transatlantique*, 211 F. at 294; *Jaffes*, 1990 AMC at 1430; *York*, 863 F. Supp. at 159. In the Ninth and Eleventh Circuits, the Implied Contractual Strict Liability Rule will apply. *Sutton*, 7 F.2d at 579; *Morton*, 984 F.2d at 289.

Although the Fifth, Sixth and Eighth Circuits cite *Kermarec* in holding cruise ship owners to a standard of reasonable care under the circumstances, no specific decisions exist in those circuits regarding Passenger Assault Cases. *Smith v. Southern Gulf Marine Co.*, 791 F.2d 416, 421 (5th Cir. 1986); *Beard v. Norwegian Caribbean Lines*, 900 F.2d 71, 74 (6th Cir. 1990); *Urian v. Milstead*, 473 F.2d 948, 950-51 (8th Cir. 1973). Absent further guidance by this Court, whether the Fifth, Sixth and Eighth Circuits will adopt the Reasonable Care Rule or the Implied Contractual Strict Liability Rule remains unknown.

Similarly, some courts conclude that the First Circuit Court of Appeals adopted the Implied Contractual Strict Liability Rule in *Muratore*, 845 F.2d at 353. However, *Doe*

recognizes the inconsistency in *Muratore*. 394 F.3d at 912 n.27. Specifically, *Muratore* states that the district court was correct in finding that "a maritime carrier has an 'unconditional responsibility for the misconduct of its people toward the passengers.'" 845 F.2d at 353 (quoting *Muratore v. M/S SCOTIA PRINCE*, 656 F. Supp. 471, 479 (D. Me. 1987)). Then, *Muratore* opines as follows:

> It is axiomatic in maritime law that a carrier owes a duty of exercising reasonable care towards its passengers under the circumstances. *Kermarec v. Compagnie Generale Tranatlantique*, 358 U.S. 625, 79 S.Ct. 406, 3 L.Ed.2d 550 (1959).

845 F.2d at 353. After noting the inconsistency in *Muratore* between the Implied Contractual Strict Liability Rule and the Reasonable Care Rule, *Doe* cavalierly concludes that "[i]n the end, the First Circuit's *Muratore* decision at worst points in both directions: unconditional responsibility and reasonable care under the circumstances." 394 F.3d at 912 n.27.

In view of the deep roots and history of the conflict and confusion in Passenger Assault Cases, it is incumbent on this Court to restore clarity and uniformity among the Circuit Courts of Appeals by stating clearly whether the Reasonable Care Rule or the Implied Contractual Strict Liability Rule applies.[14]

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[14] In addressing the standard of care in Passenger Assault Cases, the highest appellate court in Florida to address the issue has determined that existing Supreme Court and Circuit Courts of Appeals' precedent is so conflicting and confused that Florida is entitled to apply its own law without offending uniformity. *Nadeau v. Costley*, 634 So.2d 649, 652-53 (Fla. Dist. Ct. App. 1994). However, *Nadeau's* criticism regarding the confusion and conflict at the federal level fails to acknowledge similar

(Continued on following page)

CONCLUSION

Cruise lines compete with hotels, resorts, amusement parks, and other entertainment venues for vacationers and travelers. Applying different standards of care for cruise lines as compared to hotels, resorts, amusement parks, and other entertainment venues is based on archaic policy considerations and is unjust. Furthermore, the existing Supreme Court precedent is either conflicting or hopelessly confused. The Circuit Courts of Appeals are in conflict. The Supreme Court should grant the petition for certiorari to clarify this important area of maritime law.

Respectfully submitted,

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confusion and conflict among Florida's own courts. Compare *Nadeau* and *Commodore Cruise Line, Ltd. v. Kormendi*, 344 So.2d 896 (Fla. Dist. Ct. App. 1977) (adopting the Implied Contractual Strict Liability Rule) with *Rindfleisch v. Carnival Cruise Lines, Inc.*, 498 So.2d 488 (Fla. Dist. Ct. App. 1986) (adopting *Kermarec*'s Reasonable Care Rule) and *Bradley v. Guy*, 438 So.2d 854 (Fla. Dist. Ct. App. 1983) (acknowledging the Reasonable Care Rule).

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IN THE

Supreme Court of the United States

CELEBRITY CRUISES, INC., ET AL.,

Petitioners,

v.

JANE DOE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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REPLY BRIEF FOR PETITIONERS

Respondent's brief in opposition is nonresponsive. After petitioners explained that the underpinnings of this Court's nineteenth-century decisions in *New Jersey Steamboat Co. v. Brockett*, 121 U.S. 637 (1887), and *New Orleans & Northeastern Railroad Co. v. Jopes*, 142 U.S. 18 (1891), had been greatly eroded and are no longer tenable today, respondent offers no meaningful justification for their continuing application. Nor does respondent explain why a harsher standard of liability should be imposed against a cruise line than against a hotel for identical torts committed by their employees that act as waiters, bellhops, or cleaners. Similarly, respondent does not respond to petitioners' point that the legal regime that she and the Eleventh Circuit have embraced creates the anomalous result that cruise ships face strict liability for the types of dangers that they are least able to control (sexual assaults committed against passengers by off-duty crew members, even while ashore) but face a negligence standard for dangers arising from the condition of the vessel that presumably are more likely to be within the ship's control. Moreover, respondent refuses to address the conflict between the Eleventh Circuit's decision below (as well as the Ninth Circuit's decision in *Morton v. De Oliveira*, 984 F.2d 289 (9th Cir. 1993)) and the line of cases originating from the Second Circuit in which lower federal courts ask whether the passenger's injury is unique to the cruise ship environment or whether it stems from a danger that is just as likely to arise on land.

Instead of engaging on any of these fundamental issues raised in the petition, respondent devotes her twenty-five page opposition to defending the correctness of the Eleventh Circuit's decision based on the *assumption* that this Court's nineteenth-century precedent remains controlling and by drawing factual distinctions between that precedent and this Court's intervening 1959 decision in *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959). Re-

spondent's arguments are misdirected and provide no basis for this Court to overlook the strong reasons for granting review that are set forth in the petition.

I. This Court's Review Is Warranted To Reconcile *Brockett* And *Jopes* With The Modern Rule Enunciated In *Kermarec*.

The question presented in this case is whether the strict liability standard set forth in this Court's nineteenth-century jurisprudence *remains* the proper standard to apply in cases in which a cruise line's crew member commits an intentional tort against a passenger. This Court's holding in *Kermarec* that a shipowner "owes to all who are on board for purposes not inimical to his legitimate interests the duty of exercising reasonable care under the circumstances of each case," 358 U.S. at 632, stands in tension with *Brockett* and *Jopes*, as the Eleventh Circuit expressly recognized when it noted that this Court might well reconsider those nineteenth-century precedents. Pet. App. 35a. Ignoring the obvious tension, respondent does little more than offer *ipse dixit* assertions to support the continuing validity of *Brockett* and *Jopes*. Indeed, respondent has no explanation for why *Kermarec*'s reasonable standard of care under the circumstances approach should not apply in this case.

1. In her brief in opposition, respondent seeks to portray a settled legal landscape in which "two separate standards in admiralty law" have emerged. Opp. 3. According to respondent, a negligence standard applies in "garden variety maritime personal injury cases," while a higher, strict liability standard applies "only" when "a common carrier's servant" commits "an intentional tort . . . against a passenger during a voyage." *Id.* Although respondent acknowledges that the "negligence standard" has been widely applicable "since 1959" under *Kermarec*, *id.*, she contends that *Brockett* and *Jopes* "have withstood the test of time" and remain applicable in a "very specific situation." Opp. 2, 3. Despite the evident discord between these "two separate standards in admiralty law," respondent surprisingly claims that "*Brockett* and

Jopes have achieved . . . uniformity in admiralty law." Opp. 2. Whatever else might be said of respondent's interpretation of the current state of the law regarding the applicable standard of care that shipowners owe to their passengers, she plainly cannot plausibly claim that the development of "two separate standards" provides "uniformity." Indeed, precisely because there is no valid justification for imposing "two separate standards" of liability, this Court should review the Eleventh Circuit's decision below in order to ensure a more consistent approach in this area of the law.

2. Nor does respondent's feeble appeal to policy considerations hold together. In seeking to explain this Court's nineteenth-century thinking in establishing the standard imposed by *Brockett* and *Jopes*, respondent emphasizes the "special relationship that exists between a common carrier and its passenger," the "'peculiar circumstances' that surround the transportation of passengers," and the "trust inherent in the common carrier-passenger relationship," as the foundations for applying a strict liability standard. Opp. 6, 7, 24. That rationale proves too much, however, as respondent herself acknowledges when she notes that such "broad policy" considerations "nevertheless" have been given "an extremely narrow application." Opp. 8. Indeed, the three foundational bases that respondent identifies in support of a strict liability standard would seemingly require application of that standard in all cases involving passenger injuries, including the "slip and falls" that respondent concedes are governed by *Kermarec*'s reasonable care standard. Respondent has no explanation for that paradox, nor does she respond to petitioners' argument that the considerations that led to the strict liability standard are no longer viable grounds for justifying such a rule.

Similarly, rather than respond to the substance of petitioners' discussion of the modern trend in related areas of the common law to move away from the strict liability rules of the nineteenth century, Pet. 15-17, respondent simply dismisses the three state court examples given by petitioners as

"aberrations" that "contravene" respondent's view of the law. Opp. 21 n.9. Again, that is no answer at all.

3. Respondent's attempt to distinguish *Kermarec* rests on four rickety factual legs, none of which can support her theory: (1) "*Kermarec* had nothing to do with a passenger"; (2) "*Kermarec* did not involve an assault upon a passenger"; (3) "*Kermarec* was a garden variety slip and fall case where plaintiff sustained injuries allegedly due to the condition of the ship"; and (4) "*Kermarec* did not discuss either *Brockett* or *Jopes*." Opp. 18. To be sure, the facts in *Kermarec* were not identical to those presented in this case, or to the facts in *Brockett* or *Jopes*, but such factual distinctions do not mean that the *rationale* of *Kermarec* does not apply here. Even respondent later retreats from her contention that *Kermarec* is limited to non-passenger cases. Opp. 20. In the end, respondent reverts to circular reasoning by citing to the Eleventh Circuit's decision below and the Ninth Circuit's decision in *Morton* as support for her contention that *Kermarec* does not apply in this case. Opp. 20-21. Of course, the Eleventh Circuit's refusal to apply *Kermarec* in this case (consistent with the Ninth Circuit's approach in *Morton*) frames the question for this Court; it does not provide the answer.

4. Respondent's attempt to rely on more recent sources of authority to support application of a strict liability standard is equally unconvincing. These authorities provide no independent justification whatever for applying that rule in cases involving intentional torts committed by crew members against passengers, but simply cite to *Brockett* and *Jopes* as standing for an anomalous result in a discrete set of cases. For example, respondent cites to a footnote in Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty*, § 1-10 at 23 n.77 (2d ed. The Foundation Press 1975), which first explains that the principles governing liability to passengers "differ little from those in use ashore" because they are based in "negligence." Opp. 9-10. The treatise then notes in a parenthetical that the "only apparent exception" to the negligence rule is that *Brockett*'s strict liability standard has been applied in cases involving the misconduct of a common car-

rier's employees toward a passenger. Opp. 10.[1] Significantly, Gilmore and Black never attempt to defend application of the *Brockett* standard and, indeed, relegate their discussion of that outdated rule to one sentence in a parenthetical found in a footnote.

Petitioners do not deny the existence of *Brockett*, they simply ask this Court to clarify that courts no longer need to apply this "only apparent exception" to the otherwise universal reasonable care under the circumstances standard.[2]

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[1] As respondent's discussion of the Fifth Circuit's decision in *Tullis v. Fidelity & Cas. Co.*, 397 F.2d 22 (5th Cir. 1968), indicates, *Tullis* merely recites the same language found in Gilmore and Black's treatise. Opp. 15. *Tullis* does not cite *Brockett* or *Jopes*, does not involve any actions by a crew member, and its passing reference to crew member misconduct as "the only apparent exception" to a negligence standard simply cannot be read as a post-*Kermarec* Fifth Circuit endorsement of the strict liability standard. *Cf.* Opp. 21.

[2] Respondent also confuses two distinct concepts related to the application of the strict liability standard when an intentional tort is committed by a crew member "outside the scope of his employment." Respondent quotes from *THE MINNETONKA*, in which the Second Circuit rejected as an "archaic doctrine" the notion "that the moment a servant of a carrier commits a wanton assault upon a passenger he acts outside of the scope of his authority and thus releases his employer from liability." Opp. 11 (quoting *THE MINNETONKA*, 146 F. 509, 513 (2d Cir. 1906)); *see also* Opp. 12. Respondent then seeks to attribute this rejected view to petitioners. Opp. 11 n.5. But the concept rejected in *THE MINNETONKA* is quite different from the one advanced by petitioners in this case. Petitioners do not contend that *every* assault by a crew member would necessarily constitute an act outside the scope of his authority for which a cruise ship would not be liable, but rather that an assault committed by a waiter while *not on duty* and *off the ship altogether* constitutes an act that is committed outside the scope of employment and should not be imputed to the cruise ship. Neither *Brockett* nor *Jopes* evidence any intent to hold a cruise ship strictly liable in such a situation.

II. This Court's Review Is Warranted To Resolve The Split Among The Federal Courts.

1. As explained in the petition, the decision below conflicts with the analytical approach that most courts have employed since *Kermarec*. This post-*Kermarec* line of authority calls for the application of a reasonable care under the circumstances standard in passenger cases in which courts must take account of whether the particular danger confronting the passenger is "different from those encountered in daily life" or otherwise "peculiar to maritime travel." *Rainey v. Paquet Cruises, Inc.*, 709 F.2d 169, 172 (2d Cir. 1983); *Monteleone v. Bahama Cruise Line, Inc.*, 838 F.2d 63, 65 (2d Cir. 1988).[3]

Since *Kermarec*, the First, Second, Fifth, and Sixth Circuits have all framed the issue in that manner. *See Muratore v. M/S Scotia Prince*, 845 F.2d 347, 353 (1st Cir. 1988) (explaining that "the degree of care required must be in proportion to the apparent risk"); *Rainey*, 709 F.2d at 172 ("The extent to which the circumstances surrounding maritime travel are different from those encountered in daily life and involve more danger to the passenger, will determine how high a degree of care is reasonable in each case."); *Monteleone*, 838 F.2d at 65 (applying *Rainey* standard); *Smith v. Southern Gulf Marine Co. No. 2, Inc.*, 791 F.2d 416, 421 (5th Cir. 1986) (agreeing with *Rainey* standard); *Beard v. Norwegian Caribbean Lines*, 900 F.2d 71, 74 (6th Cir. 1990) (applying

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[3] Respondent contends that *THE MINNETONKA*, 146 F. 509 (2d Cir. 1906), is the "controlling Second Circuit precedent" on the question of the proper standard of care that shipowners owe their passengers. Opp. 10. Respondent places undue emphasis on that case. *THE MINNETONKA* was decided in 1906, more than 50 years before this Court's decision in *Kermarec*. Calling a case that pre-dates *Kermarec* by 50 years the "controlling" precedent is untenable. Indeed, the Second Circuit no longer follows the rule set forth in *THE MINNETONKA*, and thus explained in *Monteleone* that "[a]lthough some older cases called for a higher degree of care aboard ship, it is now clear in this Circuit that the appropriate standard is one of reasonable care under the circumstances." *See Monteleone*, 838 F.2d at 64-65 (citing *Rainey*, 709 F.2d at 172).

Rainey standard).[4] Other circuits have similarly applied the *Kermarec* standard in cases in which plaintiffs' injuries were just as likely to occur on land as at sea. *E.g.*, *Pastore v. Taiyo Gyogyo, K.K.*, 571 F.2d 777 (3d Cir. 1978) (fire-fighter's ladder slipped out of position causing him to fall); *Urian v. Milstead*, 473 F.2d 948 (8th Cir. 1973) (plaintiff passenger fell while attempting to disembark boat).

In contrast, when faced with crew member assaults on passengers, the Ninth Circuit and the Eleventh Circuit have not analyzed whether the risk of being assaulted is a danger to passengers that is in any sense "peculiar" to maritime travel. *See Morton v. De Oliveira*, 984 F.2d 289 (9th Cir. 1993); Pet. App. 1a-54a.[5] It plainly is not.

In her opposition, respondent does not address whether the Eleventh Circuit's failure to consider whether assaults are "peculiar" to maritime travel conflicts with the approaches used by other federal courts since *Kermarec*. Instead, respondent attempts to dismiss cases like *Rainey* and *Monteleone* because the facts of those cases did not involve crew member assaults, and thus she maintains that the rule ex-

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[4] In her brief in opposition, respondent mischaracterizes the First Circuit's decision in *Muratore* as applying the *Kermarec* standard to a passenger's damages resulting from a fall, but not for the intentional torts committed against the passenger by the ship's crew members. Opp. 20. The *Muratore* decision has some inconsistent language, but it is clear that its discussion of the *Kermarec* standard was made in the context of whether the ship and its crew members provided the passenger with the "courtesy and consideration" to which she was entitled. *Muratore*, 845 F.2d at 354. Questions of "courtesy and consideration" were plainly related to the hostility that the passenger received from the ship's photographers, and not to her unrelated fall on a stairwell.

[5] Respondent's suggestion that this Court's denial of certiorari in the *Sutton* and *Morton* cases from the Ninth Circuit requires denying the petition in this case is unsupportable. Opp. 8, 15. Indeed, to the extent it should have any bearing on this Court's decision, the fact that similar questions have been the subject of prior petitions for certiorari only *highlights* the importance and recurring nature of the question presented in this case, and favors granting the petition.

pressed in those cases would not apply here. But respondent reads the Second Circuit precedent too narrowly. *Rainey* and *Monteleone* require application of the reasonable care under the circumstances standard in all passenger cases, and the courts in the Second Circuit have recognized that the standard applies even in the context of crew member assaults. *See Jaffess v. Home Lines, Inc.*, 1988 WL 42049, 1990 A.M.C. 1430 (S.D.N.Y. Apr. 22, 1988); *York v. Commodore Cruise Line, Ltd.*, 863 F. Supp. 159 (S.D.N.Y. 1994).[6]

2. Respondent's attempt to demonstrate an absence of conflict among the federal courts of appeals relies in large part on pre-*Kermarec* cases. Opp. 8 (citing, for example, *THE MINNETONKA*, 146 F. 509 (2d Cir. 1906); *Kansas City S. Ry. Co. v. Willsie*, 224 F. 908 (8th Cir. 1915); *Pacific S.S. Co. v. Sutton*, 7 F.2d 579 (9th Cir. 1925); *Pullman Co. v. Hall*, 46 F.2d 399 (4th Cir. 1931); *Matthews v. Southern Ry. Syst.*, 157 F.2d 609 (D.C. Cir. 1946)). Of course, those cases are not relevant to the question presented in the petition, which turns on whether or not to apply the *Kermarec* standard to all torts committed on cruise ships.

Respondent also identifies five post-*Kermarec* cases that she contends "have unambiguously recognized that a common carrier has an unconditional responsibility for intentional torts perpetrated by their servants against passengers." Opp. 21. With the exception of the Ninth Circuit's decision in *Morton* and the Eleventh Circuit's decision below in this case, the other three decisions that respondent cites do not support her position. As explained *supra* note 1, the Fifth Circuit's decision in *Tullis* simply makes a passing remark

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[6] Although acknowledging in a footnote that *Jaffess* and *York* applied a negligence standard in cases involving crew member assaults on passengers, and thus stand in direct conflict with the Eleventh Circuit's approach in this case, respondent discounts these cases because they "contravene" this Court's decisions in *Brockett* and *Jopes*. Opp. 13 n.7. Of course, it is no answer to deny the existence of a split among the federal courts on the basis that the cases on one side of the split are purportedly incorrect.